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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 In re Application of AO KASPERSKY LAB
12 for an Order Pursuant to 28 U.S.C. §1782 to
13 Conduct Discovery for Use in a Foreign
14 Proceeding
15
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Case No.: 4:20-mc-80048-KAW

**AMENDED APPLICATION FOR
DISCOVERY UNDER 28 U.S.C. § 1782**

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19 **Introduction**

20 Petitioner AO Kaspersky Lab (“Kaspersky”) requests an order under 28 U.S.C. § 1782
21 granting leave to serve a discovery subpoena in this District for use in a foreign proceeding. The
22 subpoena will be directed to Google LLC (“Google”). This company has been identified as a source
23 of information relevant to an ongoing criminal investigation in the Russian Federation concerning
24 theft of Kaspersky software and code by several of its former employees. Government investigators
25 in Moscow recently concluded that software and code was uploaded by Kaspersky’s former
26 employees to Google Play. Google is not a party to the foreign proceeding and the information at
27 issue is only available in this District.

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1. **BACKGROUND: DISCOVERY IN THIS DISTRICT IS NEEDED FOR A PROCEEDING IN THE RUSSIAN FEDERATION**

Kaspersky is a Russian Corporation based in Moscow that develops and implements computer-security software products. Kniser Dec. ¶ 3. This § 1782 application requests discovery in aid of a criminal investigation that is now being conducted by the Russian Department of Internal Affairs¹ in Moscow, Russian Federation (the “Foreign Proceeding”). The specific information that Kaspersky seeks is:

- Any software and code related to the “NextAuth” application (com.kibersec.nextauth) uploaded to Google Play, if available;
- Any non-content information that identifies developer and application registrations for the “NextAuth” application (com.kibersec.nextauth) including email addresses and addresses.

The Foreign Proceeding is a response to a complaint by Kaspersky. Kniser Dec. ¶¶ 5-10. In general terms, the Foreign Proceeding concerns the theft and unauthorized disclosure of Kaspersky’s trade secrets by three of its former employees.² The Former Employees worked on an important project, the “Kaspersky Fraud Prevention Cloud,” while employed by Kaspersky. Kniser Dec. ¶ 6.³ Under the Former Employees’ respective employment contracts, all the software they developed during their employment is Kaspersky’s exclusive property. Kniser Dec. ¶ 6. While they were Kaspersky employees, these Former Employees started a new company, “Cybersecurity Solutions”⁴ with the website www.kibersec.com. Kniser Dec. ¶ 7.

¹ The First Unit of the Investigative Office for Organized Crime Investigation Division of the Department of Internal Affairs, North Administrative District of the Main Directorate of Internal Affairs of Russia for the City of Moscow will be referred to as the “Russian Department of Internal Affairs.”

² Alexander Anatolyevich Ermakovich, Vladimir Alexandrovich Skvortsov, and Evgeny Borisovich Kolotinsky. Kniser Dec. ¶ 6. These three will be referred to collectively as the “Former Employees.”

³ All references to “Kniser Dec.” refer to the Declaration of Casey Kniser with Exhibits A-J filed in support of this Application under 28 U.S.C. § 1782.

⁴ This company is also referred to as “Kibersec.”

1 In breach of their employment contracts, the Former Employees resigned their positions at
 2 Kaspersky and began marketing and selling their work for Kaspersky independently through their
 3 new company. Kniser Dec. ¶ 7. As a direct result of losing the Former Employees' work on Fraud
 4 Prevention Cloud, Kaspersky has incurred significant damages. Kniser Dec. ¶ 7d. The damages
 5 resulted from the Former Employees' breach of their employment contracts. Kniser Dec. ¶ 8.
 6 Kaspersky's complaint identified criminal violations by the Former Employees including fraud,
 7 illegal receipt and disclosure of secret information, abuse of authority, and copyright violations.
 8 Kniser Dec. ¶ 9.

9 The Russian Department of Internal Affairs has issued several requests for information in
 10 the course of its investigation. The first request concerned Kibersec documents under IBM
 11 Corporation's control. Kniser Dec. ¶¶ 10-11. To obtain these documents, Kaspersky Lab filed an
 12 application under § 1782 in the Southern District of New York and IBM stipulated to the issuance
 13 of a subpoena. Kniser Dec. ¶¶ 12-13.

14 A second request for information issued in October 2019 for Kibersec software, uploaded to
 15 Google servers, including the "NextAuth" application. Kniser Dec. ¶ 16. This request was later
 16 clarified in December 2019 as being directed specifically to Kibersec's NextAuth application on
 17 Google Play. Kniser Dec. ¶ 17.

18 The most recent request for information on December 27, 2019, added a request directed to
 19 the NextAuth application or Kibersec component uploaded to Google Play. Kniser Dec. ¶¶ 18-20.
 20 Google is not a party to the Foreign Proceeding in Moscow. Kniser Dec. ¶ 21.

21 **2. ARGUMENT: KASPERSKY'S APPLICATION MEETS THE STATUTORY**
 22 **AND DISCRETIONARY REQUIREMENTS FOR OBTAINING DISCOVERY**
 23 **UNDER § 1782.**

24 **A. The discovery sought from a resident of this District will be used in a foreign**
 25 **proceeding on behalf of Kaspersky, an interested party.**

26 The relevant parts of § 1782 give the Court authority to order—on "application of any
 27 interested person"—production by persons within this District of "a document or other thing for use
 28 in a proceeding in a foreign or international tribunal, including criminal investigations conducted

1 before formal accusation.” 28 U.S.C. § 1782. The Ninth Circuit summarizes the statutory
2 requirements of § 1782 as permitting “any ‘interested person’ to file an application in the district
3 court requesting that the court order another person to produce testimony or documents for use ‘in a
4 proceeding in a foreign or international tribunal.’” *Akebia Therapeutics, Inc. v. FibroGen, Inc.* 793
5 F.3d 1108, 1110 (9th Cir. 2015). Kaspersky’s application meets these requirements.

6 Kaspersky Lab is an “interested person” authorized to bring this action. The Foreign
7 Proceeding was initiated by Kaspersky Lab and concerns theft of Kaspersky Lab’s intellectual
8 property. And given the significant financial harm Kaspersky Lab has suffered – including the loss
9 of a product – it has “a reasonable interest in obtaining judicial assistance” from the foreign
10 tribunal. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004).

11 Section 1782 explicitly permits district courts to grant discovery in aid of criminal
12 investigations conducted before formal accusation. For example, granting § 1782 discovery has
13 been affirmed where the applicant, “a Swiss criminal complainant,” sought documents “to provide
14 to a Swiss investigating magistrate overseeing a criminal inquiry related to a Bernard Madoff
15 ‘feeder fund’ in Switzerland.” *In re Application for an Order Pursuant to 28 U.S.C. 1782 to*
16 *Conduct Discovery for Use in Foreign Proceedings (Berlamont)*, 773 F.3d 456, 457 and 462 (2d
17 Cir. 2014). The Foreign Proceeding here is also a criminal investigation. Kniser Dec. ¶¶ 10-11. This
18 investigation was instituted after Kaspersky, the victim, lodged a complaint against the Former
19 Employees for violating specific articles of the Russian Criminal Code. Kniser Dec. ¶ 9.

20 Kaspersky Lab’s subpoena to Google (Kniser Dec. ¶ 2, Ex. A) concerns information about
21 Kibersec and NextAuth, information that the Russian Department of Internal Affairs seeks. This is
22 the proper court for Kaspersky’s application because Google is headquartered in the Northern
23 District of California. Kniser Dec. ¶ 22. Any responsive documents produced will be given to the
24 Russian Department of Internal Affairs for use in the investigation. Kniser Dec. ¶ 23. Kaspersky’s
25 Proposed Order specifically limits use of any information received from Google to legal
26 proceedings involving the Former Employees or Kibersec. Kniser Dec. ¶ 24.

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B. The Relevant Discretionary Factors Under § 1782 Also Support Kaspersky Lab's Application.

Once the three statutory requirements are satisfied, the Court has “broad discretion” to grant Kaspersky Lab’s requested discovery. *Akebia Therapeutics, Inc. v. FibroGen, Inc.* 793 F.3d 1108, 1112 (9th Cir. 2015). The Supreme Court has identified four discretionary factors that should be considered when ruling on a §1782(a) application:

1. Whether “the person from whom discovery is sought is a participant in the foreign proceeding,” in which case “the need for § 1782(a) aid generally is not as apparent”;
2. “[T]he nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance”;
3. “[W]hether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and
4. [W]hether the request is “unduly intrusive or burdensome.”

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264-65 (2004).

The first factor favors Kaspersky’s request because Google is not a party to the Russian investigation. For this factor, “the key issue is whether the material is obtainable through the foreign proceeding.” *In re Varian Med. Sys.*, 2016 WL 1161568 at *3 (N.D. Cal. 2016). Need is “apparent” when discovery “may be unobtainable absent § 1782(a) aid.” *Intel Corp.*, 542 U.S. at 264. Kaspersky is making this discovery application under § 1782 because it has no way to obtain the documents it needs from Google in Russia. When investigators requested information from Google in Russia, they were referred to Google LLC in California. Kniser Dec. ¶ 20.

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1 The second factor also favors Kaspersky. “[T]his factor focuses on whether the foreign
2 tribunal is willing to consider the information sought.” *In re Varian Med. Sys.*, 2016 WL 1161568
3 at *4. Here, the Russian Department of Internal Affairs is investigating the details of Kibersec’s
4 software and code uploaded to Google Play. Kniser Dec. ¶ 19. This shows that the information
5 sought by this application will be considered in the Foreign Proceeding.

6 The third factor weighs in the applicant’s favor when there is “nothing to suggest that [the
7 applicant] is attempting to circumvent foreign proof-gathering restrictions.” *In re Google, Inc.*, No.
8 14-mc-80333-DMR, 2014 WL 7146994 at *3 (N.D. Cal. Dec. 15, 2014). The foreign agency
9 investigating the Former Employees and Kibersec has specifically requested information about
10 uploads to Google Play. Kniser Dec. ¶ 19. Kaspersky will submit any information obtained through
11 this § 1782 application to the Department of Internal Affairs. Kniser Dec. ¶ 23. Further,
12 Kaspersky’s Proposed Order limits the use of any information received from Google to legal
13 proceedings involving Kibersec or the Former Employees. Kniser Dec. ¶ 24.

14 The last *Intel* factor focuses on whether the discovery requested is unduly intrusive or
15 burdensome. The information requested is not intrusive because it is limited to public
16 information and non-content information. First, there can be no expectation of privacy for
17 publicly available information on Google Play. Second, non-content information is a recognized
18 exception under the Stored Communication Act. 18 U.S.C. § 2703(c)(2). Finally, the Ninth
19 Circuit has held that “email to/from addresses and IP addresses constitute “addressing
20 information” that does not allow the requesting party to learn the contents of stored
21 communications. *United States v. Forrester*, 512 F.3d 500, 512 (9th Cir. 2008).

22 The requests in this § 1782 application do not impose an undue burden because they are
23 limited to information needed by investigators in the Foreign Proceeding. Kniser Dec. ¶ 19.
24 Further, Kaspersky’s proposed subpoena has only two document requests to Google, and the
25 information requested is described in sufficient detail for a search to be performed efficiently.
26 Kniser Dec. ¶ 2, Ex. A. The proposed subpoena has been tailored narrowly under the
27 circumstances and should not impose an undue burden on Google.

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Conclusion

Kaspersky has established both the statutory and discretionary factors for discovery under § 1782. The Court is respectfully requested to grant leave to serve the proposed subpoena addressed to Google.

Dated: February 28, 2020

Respectfully submitted,

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